NOTES AND COMMENTS

EDITORS' NOTE

In the years since September 11, 2001, the *Journal* has carried a variety of pieces contributing to the ongoing public debate over the application of the international law on the use of force to threats posed by nonstate actors. Illustratively, scholarship in our pages has canvassed the practice of state and nonstate actors in nontraditional conflicts;[1] identified arguable gaps and ambiguities in existing bodies of law and indicated potential areas for new lawmaking;[2] and explored from diverse perspectives the continuing controversy over anticipatory, preemptive, or preventive self-defense.[3] In addition, our section on Contemporary Practice of the United States has published a substantial body of information on activities carried out by the United States in response to terrorist attacks and threats thereof, together with explanations and legal justifications advanced by government officials,[4] thereby facilitating a vigorous U.S. civil society debate on these matters in our pages and elsewhere. Our International Decisions department has reported on significant international cases addressing issues under the *jus ad bellum*, the *jus in bello*, and the intersection of these bodies of law with international human rights law and domestic criminal law enforcement. Our Book Review section has published reviews of volumes in which problems of lawful responses to terrorism are addressed in greater depth.[5]

In keeping with this tradition, the following Note articulating propositions on the application of the international law of self-defense to threats from nonstate actors is published with a view to spurring further debate. In order to stimulate informed consideration of legal issues in this difficult area of the law, the *Journal* expects to publish critiques of the proposal and other responses in a subsequent issue.

[1] *See* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11,* 105 AJIL 244 (2011).

[2] *See* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AJIL 201 (2011).

[3] *See*, *e.g.*, *Agora: Future Implications of the Iraq Conflict*, 97 AJIL 553 (2003); *Agora (Continued): Future Implications of the Iraq Conflict*, 97 AJIL 803 (2003); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AJIL 525 (2006).

[4] *See*, *e.g.*, John R. Crook, *State Department Legal Adviser Describes U.S. Approach to International Law*, 104 AJIL 271 (2010).

[5] *See*, *e.g.*, Elizabeth Wilmshurst, Book Review, 105 AJIL 390 (2011) (reviewing ABRAHAM D. SOFAER, THE BEST DEFENSE? (2010)).

SELF-DEFENSE AGAINST AN IMMINENT OR ACTUAL ARMED ATTACK BY NONSTATE ACTORS

*By Daniel Bethlehem**

There has been an ongoing debate over recent years about the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors. The debate predates the Al Qaeda attacks against the World Trade Center and elsewhere in the United States on September 11, 2001, but those events sharpened its focus and gave it greater operational urgency. While an important strand of the debate has taken place in academic journals and public forums, there has been another strand, largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct. Insofar as these discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.

Aspects of these otherwise largely intra- and intergovernmental discussions have periodically become visible publicly through official statements and speeches, evidence to governmental committees, reports of such committees, and similar documents. Other aspects have to be deduced from the practice of states—which, given the sensitivities, is sometimes opaque. In recent years, in a U.S. context, elements of this debate have been illuminated by the public remarks of senior Obama administration legal and counterterrorism officials,[1] including Harold Koh, the Department of State legal adviser,[2] John Brennan, the assistant to the president for homeland security and counterterrorism,[3] Jeh Johnson, the Department of Defense general counsel,[4] Attorney General Eric Holder,[5] and Stephen Preston, the Central Intelligence Agency general counsel.[6]

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[1] For a public statement of the position as it came to be in the second term of the Bush administration, see the remarks by John B. Bellinger III, the then Department of State legal adviser, at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), *at* http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf.

[2] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[3] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; John O. Brennan, Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[4] Jeh Johnson, General Counsel, U.S. Dep't of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), *at* http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.

[5] Eric Holder, Attorney General, Remarks at Northwestern University Law School (Mar. 5, 2012), *at* http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#mare-6236.

[6] Stephen Preston, General Counsel, Central Intelligence Agency, Speech at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), *at* http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912.

While there has been no similar flurry of speeches elsewhere, important elements of this debate have also attracted comment in the United Kingdom over the years. For example, between 2002 and 2006, the UK House of Commons Foreign Affairs Committee published a series of reports, entitled *Foreign Policy Aspects of the War Against Terrorism*, in which important elements of this debate were addressed.[7] In the first of its two reports from the 2002–03 session, for example, the committee addressed the doctrine of preemption contained in the Bush administration's then recently published *National Security Strategy*:[8]

> We conclude that the notion of 'imminence' should be reconsidered in light of new threats to international peace and security—regardless of whether the doctrine of pre-emptive self-defence is a distinctively new legal development. We recommend that the Government work to establish a clear international consensus on the circumstances in which military action may be taken by states on a pre-emptive basis.[9]

Subsequently, in a debate in the House of Lords in April 2004, in response to a question put to the UK government on "whether [it] accept[s] the legitimacy of pre-emptive armed attack as a constituent of the inherent right of individual or collective self-defence under Article 51 of the UN Charter; and, if so, whether [the government] will define the principles upon which it will be exercised,"[10] the then attorney general, Lord Goldsmith, answered as follows:

> Article 51 of the charter provides that,
>
> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."
>
> It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. . . . It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.
>
> The Government's position is supported by the records of the international conference at which the UN charter was drawn up and by state practice since 1945. It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike

[7] The reports and publications of the UK House of Commons Foreign Affairs Committee are available at http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/Publications/. The reports cited here are available at http://www.parliament.uk/business/committees/committees-archive/foreign-affairs-committee/fac-list-of-old-wat-reports-/.

[8] WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12–16 (2002), *at* http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf.

[9] HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2002–03, H.C. 196, para. t.

[10] 21 Apr. 2004, PARL. DEB., H.L. (2004) 356 (Lord Thomas of Gresford, statement opening the debate on international self-defense), *at* http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm.

against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.

The concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al'Qaeda and the Taliban in Afghanistan. It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.

Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be necessary to use force to deal with the particular threat that is faced. Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the charter requires that if a state resorts to military action in self-defence, the measures it has taken must be immediately reported to the Security Council. The right to use force in self-defence continues until the Security Council has taken measures necessary to maintain international peace and security. That is the answer to the Question as posed.[11]

In emphasizing that each case must be analyzed in context and that the concept of "imminence" will develop to meet new circumstances and new threats, Lord Goldsmith's statement underlined that self-defense is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day.

In a subsequent report by the House of Commons Foreign Affairs Committee in its *Foreign Policy Aspects of the War Against Terrorism* series, the committee, taking into account the statement quoted above, as well as other evidence before it,[12] went on to conclude that

the concept of 'imminence' in anticipatory self-defence may require reassessment in the light of the [weapons of mass destruction] threat but that the Government should be very cautious to limit the application of the doctrine of anticipatory self-defence so as to prevent abuse by states pursuing their national interest. We recommend that in its response to this Report the Government set out how, in the event of the legitimisation of the doctrine of anticipatory self-defence, it will persuade its allies to limit the use of the doctrine to a "threat of catastrophic attack". We also recommend that the Government explain its position on the 'proportionality' of a response to a catastrophic attack, and how to curtail the

[11] *Id.* at 370–71 (Lord Goldsmith).

[12] *See*, *e.g.*, Select Committee on Foreign Affairs, H.C., Written Evidence Submitted by Daniel Bethlehem QC, Director of the Lauterpacht Research Centre for International Law, University of Cambridge, "International Law and the Use of Force: The Law as It Is and as It Should Be" (June 7, 2004), *at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm.

abuse of that principle in the event of the acceptance of the doctrine of anticipatory self-defence by the international community.[13]

In parallel to these reports and statements, a good deal of scholarly writing has addressed the scope of the right of self-defense against imminent and actual armed attacks by nonstate actors. These writings have illuminated the complexity of the issues as well as the doctrinal divide that continues to beset the debate—between those who favor a restrictive approach to the law on self-defense and those who take the view that the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats.

This scholarship faces significant challenges, however, when it comes to shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad. There is little intersection between the academic debate and the operational realities. And on those few occasions when such matters have come under scrutiny in court, the debate is seldom advanced. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.

This situation is unsatisfactory. Particularly in this area of law, it is important that principle is sensitive to the practical realities of the circumstances that it addresses, even as it endeavors to prohibit excess and the egregious pursuit of national interest. The challenge is to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defense against an imminent or actual armed attack by nonstate actors. To this end, the sixteen principles set out below are proposed with the intention of stimulating a wider debate on these issues.

The principles do not reflect a settled view of any state. They are published under my responsibility alone. They have nonetheless been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters. The hope, therefore, is that the principles may attract a measure of agreement about the contours of the law relevant to the actual circumstances in which states are faced with an imminent or actual armed attack by nonstate actors.

These principles are not intended to be enabling of the use of force. They are intended to work with the grain of the UN Charter as well as customary international law, in which resides the inherent right of self-defense, including anticipatory self-defense, usually traced back to the Webster-Ashburton correspondence of 1842 concerning the *Caroline* incident. The customary international law on state responsibility may also have a bearing on these issues.

This said, some of the principles will undoubtedly prove controversial. There is little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats. Similarly, there is little consensus on who may properly be targetable within the non-

[13] HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2003–04, H.C., 441-I, para. 429.

state-actor continuum of those planning, threatening, perpetrating, and providing material support essential to an armed attack. Principles 6, 7, and 8 are therefore likely to attract comment, as no doubt also will others.

The reality, however, is that these principles address the kinds of circumstances that many states face today (and have been facing for some time)—which often require difficult decisions concerning the use of force. And it is not just the United States, the United Kingdom, and other Western states that face such threats. States ranging from Colombia to Kenya to Turkey, among others, have had to confront similar issues in recent years.

It is by now reasonably clear and accepted that states have a right of self-defense against attacks by nonstate actors—as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States. There is, however, a paucity of considered and authoritative guidance on the parameters and application of that right in the kinds of circumstances that states are now having to address. These circumstances include those of (1) successive attacks or threats of attack against a state or its interests, (2) attacks or threats of attack emanating from more than one territorial jurisdiction, and (3) attacks or threats of attack by a nonstate actor operating either as a distinct entity or in affiliation with a larger nonstate movement.

Separate from the above, while "imminence" continues to be a key element of the law relevant to anticipatory self-defense in response to a threat of attack, the concept needs to be further refined and developed to take into account the new circumstances and threats from nonstate actors that states face today.

In considering the principles, it is important to bear in mind three types of circumstances in which they might apply: (1) circumstances in which any given state might consider that it would have an imperative to act, (2) circumstances in which another state, with potentially opposing interests to the first, might consider that it would have an imperative to act, and (3) circumstances in which one state might consider that it had an imperative to act in support of another state, thereby engaging considerations either of collective self-defense or of state responsibility relevant to the provision of aid or assistance. An essential element of any legal principle is that it must be capable of objective application and must not be seen as self-serving—that is, in the interests of one state, or small group of states, alone.

The principles are intended to be indicative, rather than exhaustive, of elements of a state's right of self-defense against an imminent or actual armed attack by nonstate actors. They address only the *jus ad bellum* (the law relevant to the resort to armed force) rather than the *jus in bello* (the law relevant to the conduct of military operations). As such, the principles address the threshold for the use of armed force in self-defense rather than the use of force in ongoing military operations. Any use of force in self-defense would be subject to applicable *jus in bello* principles governing the conduct of military operations.

The principles are offered for debate without any accompanying explanatory memorandum or commentary to situate them within the academic discussion or jurisprudence. Their intent is to address a strategic and operational reality with which states are faced, and to formulate principles that reflect, as well as shape, the conduct of states in the particular circumstances in question.

*Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors**

1. States have a right of self-defense against an imminent or actual armed attack by nonstate actors.
2. Armed action in self-defense should be used only as a last resort in circumstances in which no other effective means are reasonably available to address an imminent or actual armed attack.
3. Armed action in self-defense must be limited to what is necessary to address an imminent or actual armed attack and must be proportionate to the threat that is faced.
4. The term "armed attack" includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity. The distinction between discrete attacks and a series of attacks may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action.
5. An appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis[a] for concluding that those threatening[b] or perpetrating such attacks are acting in concert.
6. Those acting in concert include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks, such that they can be said to be taking a direct part in those attacks.[c]
7. Armed action in self-defense may be directed against those actively planning, threatening, or perpetrating armed attacks. It may also be directed against those in respect of whom there is a strong,[d] reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.
8. Whether an armed attack may be regarded as "imminent" will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in

* As the introduction accompanying these principles and setting them in context makes clear, they are proposed with the intention of stimulating debate on the issues. They do not purport to reflect a settled view of the law or the practice of any state.

[a] The "reasonable and objective basis" formula—in paragraphs 5, 7, 8, 11, and 12—requires that the conclusion is capable of being reliably supported with a high degree of confidence on the basis of credible and all reasonably available information.

[b] The term "threatening"—in paragraphs 5, 6, 7, and 9—refers to conduct that, absent mitigating action, there is a reasonable and objective basis for concluding is capable of completion and that there is an intention on the part of the putative perpetrators to complete. Whether a threatened attack gives rise to a right of self-defense will fall to be assessed by reference to the factors set out inter alia in paragraph 8.

[c] The concept of direct participation in attacks draws on, but is distinct from, the *jus in bello* concept of direct participation in hostilities.

[d] The addition of the adjective "strong" to the "reasonable and objective basis" formula—in paragraphs 7 and 12—raises the standard that is required for the conclusion in question, given that this assessment would form the basis for taking armed action against persons other than those planning, threatening, or perpetrating an armed attack.

self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

9. States are required to take all reasonable steps to ensure that their territory is not used by nonstate actors for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other states and their interests.

10. Subject to the following paragraphs, a state may not take armed action in self-defense against a nonstate actor in the territory or within the jurisdiction of another state ("the third state") without the consent of that state. The requirement for consent does not operate in circumstances in which there is an applicable resolution of the UN Security Council authorizing the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Where consent is required, all reasonable good faith efforts must be made to obtain consent.

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding[e] with the nonstate actor or is otherwise unwilling[f] to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In the case of a colluding or a harboring state, the extent of the responsibility of that state for aiding or assisting the nonstate actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action, including against the colluding or harboring state.

12. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable[g] to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In such circumstances, in addition to the preceding requirements, there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense. The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the nonstate actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state.

[e] Referred to as a "colluding state."

[f] Referred to as a "harboring state."

[g] As here described, referred to as a "reluctant host."

13. Consent may be strategic or operational, generic or ad hoc, express or implied. The relevant consideration is that it must be reasonable to regard the representation(s) or conduct as authoritative of the consent of the state on whose territory or within whose jurisdiction the armed action in self-defense will be taken. There is a rebuttable presumption against the implication of consent simply on the basis of historic acquiescence. Whether, in any case, historic acquiescence is sufficient to convey consent will fall to be assessed by reference to all relevant circumstances, including whether acquiescence has operated in the past in circumstances in which it would have been reasonable to have expected that an objection would have been expressly declared and, as appropriate, acted upon, and there is no reason to consider that some other compelling ground operated to exclude objection.
14. These principles are without prejudice to the application of the UN Charter, including applicable resolutions of the UN Security Council relating to the use of force, or of customary international law relevant to the use of force and to the exercise of the right of self-defense by states, including as applicable to collective self-defense.
15. These principles are without prejudice to any right of self-defense that may operate in other circumstances in which a state or its imperative interests may be the target of imminent or actual attack.
16. These principles are without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant.